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No. 80-11
IN THE

Supreme Court of the United States

OCTOBER TERM 1980

J. GREGORY MERRION AND ROBERT L. BAYLESS, d/b/a MERRION AND BAYLESS, JEROME T. MCHUGH, CHACE OIL COMPANY, DUGAN PRODUCTION CORPORATION, CONSOLIDATED OIL AND GAS, INC., SOUTHLAND ROYALTY COMPANY, TESORO PETROLEUM CORPORATION, AMERADA HESS CORPORATION, SUPRON ENERGY CORPORATION, ENERGY RESERVES GROUP, INC., J. M. HUBER CORPORATION, CONTINENTAL OIL COMPANY (now CONOCO INC.), ATLANTIC RICHFIELD COMPANY, PHILLIPS PETROLEUM COMPANY, TENNECO OIL COMPANY, GETTY OIL COMPANY, GULF OIL CORPORATION, MOBIL OIL CORPORATION, AND OXY PETROLEUM, INC.,

Petitioners,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL, AND CECIL ANDRUS, SECRETARY OF THE INTERIOR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF THE PETITIONERS

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LISTING OF SUBSIDIARIES AND AFFILIATES OF CORPORATE PETITIONERS

The subsidiaries (other than wholly-owned) and affiliates of the corporate Petitioners are set forth in the separately printed "Special Appendix List of Corporate Subsidiaries and Affiliates of Corporate Petitioners Pursuant to Amended Rule 28.1, Rules of the Supreme Court of the United States," which has been filed previously and which is incorporated herein.

.....

THOMAS H. BURTON
On behalf of Petitioners
J. Gregory Merrion and
Robert L. Bayless, *et al.*
Cause No. 80-11

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J. GREGORY MERRION AND ROBERT L. BAYLESS,
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TRIBAL COUNCIL, AND CECIL ANDRUS,
SECRETARY OF THE INTERIOR,

Respondents.

REPLY BRIEF OF THE PETITIONERS

Petitioners Merrion and Bayless, *et al.* submit this Reply Brief to the Brief for Respondent Jicarilla Apache Tribe and Brief for the Secretary of the Interior.

Points not addressed by Petitioners herein are covered by the Reply Brief of Petitioners in Cause No. 80-15.

POINT I

THERE IS NO LEGAL FOUNDATION FOR THE JICARILLA APACHE TRIBE TO TAX OIL AND GAS PRODUCED UNDER FEDERALLY APPROVED LEASES

A.

The Executive, Legislative And Judicial Branches Of The Federal Government Share A Common Assumption That Indian Tribes Lack Coercive Governmental Authority Over Non-Indians Generally And Especially Those Operating Under Federal License.

Respondent Jicarilla Apache Tribe relies on its "inherent sovereignty" as the source of its authority to impose the severance tax in question here. Respondent Secretary of the Interior asserts the tribe "retained" its rights to tax non-Indians as an attribute of its sovereignty. Both rely primarily upon *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, ... U.S. ...., 65 L.Ed.2d 10, 100 S. Ct. 2069 (1980) to support this contention of sovereignty. In *Colville*, the non-Indians did not challenge the tribal tax and entered the reservation with full knowledge that in doing so they would be subjected to such tribal taxation if they chose to buy cigarettes while there. The only possible tribal sanction was refusal to sell cigarettes to non-Indians refusing to pay the tax. The Court noted that relevant treaties had recognized "inherent tribal power to exclude non-Indians or impose conditions on those permitted to enter ...." .... U.S. 65L.Ed.2d at 31, 100 S. Ct. at 2082, making it clear the power to tax was based on the tribe's power to exclude non-members from the reservation.

An analysis of the other cases relied on by Respondents shows that the courts have consistently upheld tribal permit fees on either (1) an express delegation of federal governmental authority; or (2) the tribal right to condition entry onto the reservation.

In both of these situations, Indian tribes may properly exhibit some aspects of self-determination, rather than true sovereignty. In the first situation tribes may exercise some of the federal government's delegated authority, under the reach of federal sovereignty. *United States* v. *Mazurie*, 419 U.S. 544 (1975); *Settler* v. *Yakima Tribal Court*, 419 F.2d 486 (9th Cir. 1969) cert. den. 398 U.S. 903 (1970). In the second situation the tribe merely regulates access to and use of the private property of its members located on the reservation. *Morris* v. *Hitchcock*, 194 U.S. 384, 392 (1904); *Tribal Power — Exclusion of Non-Indian Attorneys*, I Inter. Solic. Op. 775, 776 (1937). Neither analysis applies in this case. The Court of Appeals below noted "no treaty or act of Congress specifically authorizes the exercise of such a taxing power" (J.A. 145), and pursuant to the lease terms the Tribe agrees lessees "essentially have unlimited access to the reservation". (Jicarilla Brief, 3).

Buster v. *Wright*, 135 Fed. 947 (8th Cir., 1905), app. dism'd, 203 U.S. 599 (1906) is the sole authority cited by Respondents in support of their contention that the power of a tribe to tax non-members may exist independently of its right to exclude. The tax involved, however, was a permit tax based on federal delegation, approved by the President under the Curtis Act and enforced by the Secretary of the Interior. The Court also traced the tribal authority to attach the tax to "the privilege which it offers to those who are not citizens of its nation of trading within its borders", and noted that, as such, it was entirely "optional". 135 F. at 949.[1]

In *Maxey* v. *Wright*, 54 S.W. 807 (Ct. App. Ind. Terr.), aff'd, without opinion, 105 Fed. 1003 (8th Cir. 1900), another case relied on by Respondents, the Creek tribe had imposed a "permit

[1] In this respect the Creek tax was similar to the "voluntary tax" this court approved in *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, ... U.S. ...., 65 L.Ed.2d 10, 100 S.Ct. 2069 (1980).

tax" on each lawyer practicing on the Creek Reservation. In an action to enjoin the federal Indian agent from collecting the tax, the Court of Appeals noted that the Creek treaty declared all persons on the reservation without consent of the tribe to be "intruders", expressly subject to removal. The Court concluded that the tribe had the right to require a permit to reside within its reservation and to "levy a pecuniary exaction therefore". 54 S.W. at 809. The Court noted, however, that any powers of enforcement resided exclusively in the United States and not the tribe, 54 S.W. at 812.

Other cases relied on to support this power to tax include *Iron Crow* v. *Oglala Sioux Tribe of Pine Ridge Reservation*, 231 F.2d 89 (8th Cir. 1956) and *Barta* v. *Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F.2d 553 (8th Cir. 1958), cert. den. 358 U.S. 932 (1959). In *Iron Crow*, the Eighth Circuit Court affirmed a district court decision, 129 F. Supp. 15, 24, describing the tribal tax as one levied "for the privilege of doing business on reservation land" and collected by the United States. Also in *Barta*, it is evident from a review of the district court decision, 146 F.Supp. at 917, that the tax involved was considered merely a condition placed upon the privilege of doing business on the reservation.

In *Morris* v. *Hitchcock*, 194 U.S. 384 (1904), non-Indian owners of livestock again brought an action against federal officials to enjoin removal of plaintiffs' livestock for non-payment of a tribal tax. Since the tax was to be paid directly to the United States, this Court upheld the power of Interior to remove the livestock. 194 U.S. at 385, n. 1. As Respondent Secretary notes, the tribal tax was in effect a federal regulation "to be enforced with the assistance of the federal government, by expulsion of the offending non-Indian or closing his business, not through criminal sanctions imposed by the tribe." (Secretary's Brief, 13).

The Jicarillas interpret *United States* v. *Mazurie*, 419 U.S. 544 (1975) as "reaffirming the tribe's sovereignty over its territory and power to license non-Indians". (Jicarilla Brief, 18; see also Secretary's Brief, 9, n. 1). Petitioners do not dispute that the tribe has the power to "license non-Indians" as a condition to their entry onto the reservation, but do not interpret *Mazurie* as recognizing complete tribal sovereignty over reservation territory. *Mazurie* involved an express delegation of federal authority under 18 USC 1161 to the tribe to regulate the introduction of liquor into Indian country, so long as tribal regulation did not violate state law. The defendants applied for a tribal liquor license under this ordinance, but when it was rejected, operated their bar without a federally sanctioned license. Federal, not tribal, officers seized their alcoholic beverages and the United States attorney filed criminal charges against them in federal court. This Court made it clear that the issue in *Mazurie* was not whether the tribe had inherent regulatory authority over non-Indians, but whether Congress could specifically delegate a limited area of its governmental authority over Indian affairs to the tribe itself. 419 U.S. at 557.

More recent cases have recognized inherent limitations on tribal sovereignty as applied to non-Indians. *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978); *United States* v. *Wheeler*, 435 U.S. 313 (1978).

The logic of *Oliphant*, and the cases relied upon therein, cannot be limited to criminal jurisdiction. Taken as a whole, *Oliphant* applies equally to coercive tribal regulation of non-Indians, whether considered civil or criminal. The attorney for the Suquamish tribe recognized this.[2] Both lower courts and legal

[2] Transcript of oral argument before the United States Supreme Court in *Oliphant* v. *Suquamish Indian Tribe*, at 54-55.

scholars have also recognized the logic of *Oliphant* limits tribal civil, as well as criminal, jurisdiction over non-members.[3]

United States v. *Wheeler, supra,* also recognizes this limitation on tribal authority. Speaking for the Court, Justice Marshall stated that the tribal "right of internal self-government includes the right to prescribe laws applicable to *tribe members* and to enforce those laws by criminal sanctions". 435 U.S. at 322. The *Wheeler* decision repeatedly noted that Indian tribes were generally divested of governmental sovereignty in areas involving "relations between an Indian tribe and non-members of the tribe". 435 U.S. at 326.

The line of tribal tax cases relied on by Respondents, then must be read narrowly. and should be reconsidered if they are to be expanded to recognize tribal governmental authority over non-Indians. All of these cases involve either delegation of *federal* authority to the Indians or amount merely to imposition of a *license* fee, under the loose guise of a private "tax", as a condition of entry on Indian proprietary lands. These cases did not address and did not decide the question of Indian sovereignty as it is now presented — the true sovereignty inherent in a governmental entity. It is inconceivable that courts at the turn of the century could even fleetingly have considered that Indian tribes had governmental sovereignty over non-Indians in any respect.

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[3] See, *e.g., Dry Creek Lodge Inc.* v. *Arapahoe and Shoshone Tribes,* 623 F.2d 682, 684 (10th Cir. 1980); *Montana* v. *United States,* 604 F.2d 1162 (9th Cir. 1979) cert. granted, .. U.S. .., No. 79-1128 (1979); *Sechrist* v. *Quinault Indian Nation,* C76-823 M (W.D. Wash., 1979); *Trans-Canada Enterprises Ltd.* v. *Muckleshoot Indian Tribe,* No. C-77-882 M (W.D. Wash., 1978) rev'd other ground, 634 F.2d 474 (9th Cir. 1980); Martone, *Of Power and Purpose,* 54 Notre Dame Lawyer, 829 (1979); Nowack, *et al., Constitutional Law 18* (West, 1980 Supp.); *cf., State of Wisconsin* v. *Baker,* 464 F.Supp. 1377, 1382 (W.D. Wisc. 1978).

The judicial decisions of this era, and later decisions which followed in the name of stare decisis,[4] reflected the Indian policy of the times. That policy was to conquer the Indians, then isolate them on remote reservations in the still unpopulated West in order to permit settlement of the frontier[5]. The segregation of the Indians on tribal reservations led to the federal government's administrative need for recognizing some form of tribal organization and self-government of tribal members.[6] The government therefore had to delegate to Indians some federal authority to control entry onto their reservation lands. The cases which have spoken of "inherent sovereignty", generally in dicta, and thus recognized an Indian license or "tax" for condition of entry, reflected this existing federal policy. They did not even consider the Draconian implications of Indian governmental sovereignty now raised.

B.

The Jicarilla Apaches Were Not An Organized Tribe At The Time The United States Constitution Was Adopted Nor When The Treaty of Guadalupe Hidalgo Was Entered Into.

The Jicarilla Apache Tribe argues "That Spanish officials also recognized the sovereignty of hunting tribes of Indians is confirmed in the treaty between Governor Anza of New Mexico and the Comanches in the Spanish-Comanche Peace Treaty of 1786" (Jicarilla Brief, 13-14, fn. 7).[7] The Spanish undoubtedly

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[4] *Iron Crow, supra,* where the Court spoke of "quasi-sovereignty". 231 F.2d 92, 94 (1956); *Barta, supra.*

[5] See, *e.g., Jicarilla Apache Tribe* v. *United States,* 17 Ind. Cl. Comm. 338, 370-402 (1966); *Stephans* v. *Cherokee Nation,* 174 U.S. 445, 451 (1899); *Montoya* v. *United States,* 180 U.S. 261 (1901).

[6] Act of June 30, 1834, c. 161, §10-11, 4 Stat. 729-30; Act of March 1, 1889, c.333, §6, 25 Stat. 783; Act of March 27, 1854, c. 26, §3, 10 Stat. 269.

[7] The Government takes a somewhat inconsistent position and argues that the Jicarilla Tribes "power to tax is a residuum of aboriginal

did not consider the Jicarillas an entity significant enough to merit a treaty relationship, and for good reason. The fact is there was no formal organization among the Jicarilla Apaches during the pre-reservation period and there is no evidence that they acted as a unified political entity before arriving on the reservation.[8] The Spanish treaty did not amount to a recognition of Indian sovereignty over non-Indians. Moreover, there was no treaty, either by Spain, Mexico, or the United States, with the Jicarilla Apaches.[9] The United States Senate refused to ratify the final attempt to achieve a peace treaty sought by the Jicarillas.[10]

The arguments of the Jicarillas and the Secretary that the Tribe possesses "inherent sovereignty" adequate to impose taxes on non-Indians are unsupported both legally and historically. The concept of Indian taxing authority over non-Indians does not fall within the right of Indians "to make their own laws and be governed by them" which is the full extent of Indian sovereignty. *Williams* v. *Lee*, 358 U.S. 217, 220 (1959).

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independence" and does not vary depending upon a tribe's historical organization and relations with the government. [Secretary's Brief 5, 17-18.] The Secretary's position has been rejected by the courts and by the Solicitor of the Interior himself. See, *e.g.*, *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, reh. den. 348 U.S. 965 (1955); *Powers of Indian Group Organized Under IRA But Not As Historical Tribe*, I Inter. Solic. Op. 813-4 (1938).

[8] U. S. Dept. of Commerce, *Federal and State Indian Reservations*, 356 (1976); H. Ex. Docs., 33 Cong., 2d Sess., I, No. I, Pt. 1, at 378 (1854); H.R. Rep. No. 2503 (1953); Wilson, *Jicarilla Apache Political and Economic Structures*, 324-6 (U. Cal. Press 1964); Schroeder, *Apache Indians I*, 397, 411 (Garland 1974).

[9] Bender, *A Study of Jicarilla Apache Indians*, Prepared for the U.S. Dept. of Justice, 55-69, *Apache Indians IX* (Garland 1974)

[10] Sen. Doc. No. 1, 34th Cong., 1st Sess. (1855); Sen. Doc. No. 5, 34th Cong., 3rd Sess. (1856)

C.

The Indian Reorganization Act Did Not Confirm Or Reaffirm The Authority Of The Jicarilla Apache Tribe To Impose A Tax On Oil And Gas Produced By Federal Lessees.

Respondents rely on an Interior opinion to support their contention that the Indian Reorganization Act has "conferred" and "reaffirmed" tribal powers of taxation over non-Indians. (Jicarilla Brief, 23-3; Secretary's Brief, 11). That opinion, *Powers of Indian Tribes*, 55 I.D. 14 (1934), did not unqualifiedly support the presently-espoused thesis of Indian sovereignty. Solicitor Margold there recognized the limitations on tribal powers to impose burdens on federal licensees using their lands:

> Over tribal lands, the tribe has the rights of a landowner as well as the rights of a local government, dominion as well as sovereignty. But over all the lands of the reservation, whether owned by the tribe, by members thereof, or by outsiders, the tribe has a sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business, *provided only such determination is consistent with applicable federal laws and does not infringe any vested rights of persons now occupying reservation lands under lawful authority*. 55 I.D. at 50 (emphasis supplied).

That Opinion, therefore, recognized two significant points. First, tribal "sovereignty" rests primarily upon the power to exclude or condition entry onto the reservation. Second, it is totally inappropriate when applied to the vested rights of non-Indians operating on the reservation under Federal license.

The Solicitor's conclusion that the Indian Reorganization Act does not extend coercive governmental authority to the property rights of non-Indians is consistent with subsequent Solicitors' opinions on the subject. *Rosebud Sioux Tax Ordinance*, I Inter. Solic. Op. 873, (1939) analyzed limitations inherent in enforcing taxation against non-members of the tribe. The Solicitor there noted that "a practical means of enforcement is particularly

necessary since non-members are not subject as involuntary defendants to the jurisdiction of the tribal court." *(Ibid.*, at 875). The Opinion then analyzed the 1934 Opinion and noted that it tied tribal authority to tax non-members to the power to exclude or limit their entry. *(Ibid.*, at 876).

The 1939 Opinion recognized non-members married to tribal members, or operating tribal land under federal authority, could not be subject to direct tribal taxation since they could not legitimately be removed from the reservation. Enforcement would therefore depend upon prohibiting tribal members from doing business with non-Indians. *(Ibid.).*

The Respondent Secretary's contention that the Indian Reorganization Act does not distinguish between Executive Order and treaty reservations regarding tribal taxation (Secretary's Brief, 18) is directly contrary to another of the Interior Solicitor's opinions which found aggregations of Indians who had not historically exercised powers of tribal sovereignty could not retain all the powers enumerated in the Indian Reorganization Act. In *Powers of Indian Group Organized Under IRA But Not As Historical Tribe,* I Inter. Solic. Op. 813 (1938), Solicitor Margold stated:

> . . . [T]hat under Section 16 of the Indian Reorganization Act *a group of Indians which is organized on the basis of a reservation and which is not an historical tribe may not have all of the powers enumerated in the Solicitor's opinion on the Powers of Indian Tribes dated October 25, 1934.* The group may not have such of those powers as rest upon the sovereign capacity of the tribe but may have those powers which are incidental to its ownership of property and to its carrying on of business, and those which may be delegated by the Secretary of the Interior.
>
> In the case of these two communities three of the powers listed in the constitutions have been found not to be within the permissible limits . . . These powers were the power . . . *to levy taxes upon members of the community.* . . . [T]he last [power] *was modified to restrict it to a permissible*

> *scope by allowing the levying of assessments upon members of the tribe for the use of community property and privileges.* I Inter. Solic. Op. 814 (emphasis supplied).

The Interior Department has also recognized that the Indian Reorganization Act cannot confer tribal powers of taxation upon tribes which failed to exercise tribal autonomy prior to 1934. *Federal Indian Law,* at 886, (G.P.O. 1958), emphasizes that the Indian Reorganization Act does not, of itself, authorize tribal taxation:

> "Under Section 16 of the Act of June 18, 1934, tribal constitutions containing provisions authorizing taxation of members and non-members have been adopted by many tribes and approved by the Secretary of the Interior. Since there is no express grant of taxing power in the Act, such power must be traced to tribal autonomy, the power to exclude, or some federal statute or treaty".

In the earlier edition of that text, Felix Cohen, well known as the champion of Indian "sovereignty", recognized that "there is no express grant of taxing power in the Act", *Federal Indian Law,* 267 (Univ. N. Mex. 1945). This Court, as well as legal commentators, has recognized the Indian Reorganization Act did not grant Indian tribes coercive powers of government over non-members.[11]

The possibility of granting Indian tribes broadly expanded "municipal" authority was discussed during the debate on the Indian Reorganization Act. Substantial opposition emerged in the Senate to the original draft of the Act which specifically granted Indian tribes the power to "set up a government within a government".[12]

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[11] *Oliphant* v. *Suquamish Indian Tribe,* 435 U.S. 191, 195, n. 6 (1978); *Organized Village of Kake* v. *Egan,* 369 U.S. 60, 73 (1962); Krieger, *Principles of the Indian Law,* 3 Geo. Wash. L. Rev. 279, 302 (1935); Mettler, *A Unified Theory Of Indian Tribal Sovereignty,* 30 Hastings L.J. 89, 97 (1978); Spicer, *Cycles of Conquest* (Univ. Ariz. 1962).

[12] See State of Washington Amicus Brief, 11-15.

It is inconceivable that numerous Indian tribes, including several Amici herein, would have petitioned for repeal of the Indian Reorganization Act if it indeed conferred or reaffirmed significant tribal governmental powers yet, this is the course several principal tribes took.[13]

POINT II

ANY TRIBAL POWERS OF TAXATION POSSESSED BY THE JICARILLA APACHE TRIBE OVER NON-INDIANS HAVE BEEN PRE-EMPTED AS TO THE PETITIONERS HEREIN

A.

Tribal Regulations May Be Preempted Or Divested By Federal Interests.

The Jicarillas argue that federal interests can preempt conflicting or inconsistent state, but not tribal, authority. (Jicarilla Brief, 24-27). This assertion ignores direct parallels between this Court's decisions regarding preemption of state authority, and the doctrine of implied divestiture of tribal authority. *Cf., Warren Trading Post* v. *Arizona Tax Commission,* 380 U.S. 685 (1965), *Oliphant* v. *Suquamish Indian Tribe,* 435 U.S. 191 (1978).

The Jicarillas argue that the inherent sovereign authority of Indian tribes to tax mineral resource development must be "expressly limited or divested by Congress". (Jicarilla Brief, 27-8). This Court rejected the identical premise in *Oliphant:*

> "Under respondents' theory, however, Indian tribes would have been free to try the same non-Indians without these careful proceedings unless Congress affirmatively legislated to the contrary. Such an exercise of exercise of *jurisdiction*

[13] The Shoshone, Rosebud Sioux, Pine Ridge, Yankton and Cheyenne Tribes sent delegations to the Senate seeking repeal of the Indian Reorganization Act. 78 Cong. Rec. 11736-40 (1934); Senate Committee on Indian Affairs, Survey of Conditions of the Indians in the United States, Part 37 (1936-1940), 21625, 21802, 21904.

> *over non-Indian citizens* of the United States *would belie the tribe's forfeiture of full sovereignty* in return for the protection of the United States". 435 U.S. at 211 (emphasis supplied).

In *Wheeler* the Court again recognized that "Their [Indian tribes'] incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised." 435 U.S. at 323. Justice Marshall further noted that rather than requiring an express Congressional defeasance, "The areas in which such *implicit divestiture* of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and non-members of the tribe." 435 U.S. at 326 (emphasis supplied).

While the majority opinion in *Colville* refers to a shared presumption of non-divestiture of tribal taxation authority generally, it recognizes "such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government . . . ." ....U.S....., 65 L.Ed.2d at 29, 100 S.Ct. at 2081. In the present case there can be little doubt that tribal taxation of domestic energy sources produced from federal land is contrary "to the interests of the National Government."[14]

Jicarilla reliance upon *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978) is unavailing, since that case clearly involved the relation between a tribe and its members or would-be members. Tribal power to govern its own members does not reach the asserted level of sovereignty to control non-members.

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[14] Compare the tribal intentions regarding resource regulation and development as reflected in Bureau of Competition, *Report to the Federal Trade Commission on Leasing of Indian Lands, at 40* (1975), with the interests of the National Government as discussed in the amicus brief herein of The Mountain States Legal Foundation, at 17-19, and the amicus brief filed by numerous United States Congressmen and Senators in *Commonwealth Edison Company v. State of Montana*, No. 80-851.

Bryan v. *Itasca County*, 426 U.S. 373 (1976), (Jicarilla Brief, 29), simply involved county authority to tax personal property of a tribal member residing on federal trust land. In the case at bar, the issue is whether an Indian tribe can tax a non-Indian operating under federal license on the reservation, without express authority from Congress. In *Bryan*, this Court held that the county could not do so, without express Congressional authority. In the present case, Petitioners submit that the tribe cannot validly tax in the absence of express Congressional authorization, and in the face of express authorization of state taxation.

B.

The Provisions of 25 USC 398c Were Intended To Grant the State the Exclusive Right To Tax Oil And Gas Produced From Executive Order Indian Reservations.

Respondents contend that Congress did not attempt to strike a balance between the interest of the states and Executive Order Indian Tribes in adopting 25 USC 398c. The Secretary, however, recognizes that prior to the adoption of this Act "the most important model is the Mineral Lands Leasing Act of February 25, 1920." (Secretary's Brief, 21). That 1920 Act gave the states not only the right to tax oil and gas produced on federal land, but also 32½% of the royalties *(Ibid.*, 22). Several of the various bills introduced over the three year period leading to the adoption of 25 USC 398c were patterned on the Mineral Lands Leasing Act and gave the states a percentage of the royalties, generally in addition to the right to tax the non-royalty share.[15] In the end, however, this "important model" was not copied and the States were awarded only taxation authority.

[15] See S. 876, 66 Cong. Rec. 5433 (1925); Hearings, Subcomm. of the Committee on Indian Affairs, H.R. 69th Cong., 1st Sess. on H.R. 9133 (1926); Hearings, Committee on Indian Affairs, 69th Cong., 1st Sess. on S. 3159, at 4-5 (1926); Hearings, Subcomm. of the Committee on Indian Affairs, Sen. 69th Cong., 1st Sess. on S. 1722 (1926).

The Jicarillas recognize there was a dispute over tribal title to minerals on Executive Order lands, but maintain that "Congressional sentiment was overwhelmingly in favor of recognizing tribal royalty rights in Executive Order reservations, and there was never any compromise based on this point." (Jicarilla Brief, 36). However, more than the "handful of congressmen" described by the Jicarillas questioned tribal title to Executive Order reservations. In addition to several congressmen and senators from the western states[16] many federal officials with supervisory responsibility over Indian affairs candidly recognized that such Executive Order tribal claims were questionable. As Commissioner of Indian Affairs, Charles Burke, said:

> ". . . it is doubtful from a strict legal sense that the court would hold that these executive orders vested in the Indians title to everything that was in the land described in those areas".[17]

Assistant Secretary of the Interior Finney agreed:

> "My opinion of the law is that public lands, under the Constitution of the United States and the laws of the United States, can only be disposed of by Congress, and that the President of the United States cannot by Executive Order vest the title in public lands either in Indians or white men. He has not the authority to do that. And consequently an executive order of this sort does not vest a fee simple title in the Indians."[18]

Finney also noted that the only pertinent federal court decision held that fee title to the minerals underlying Executive

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[16] 67 Cong. Rec. 10915, 10995 (1926); 68 Cong. Rec. 4569 (1927).

[17] Hearings, Subcomm. of the Committee on Indian Affairs, Sen., 69th Congress, 1st Sess., on S.1722 and S.3159 (1926); see also, Hearings, Subcomm. of the Committee on Indian Affairs, H.R., 69th Cong., 1st Sess. on H.R. 9133, at 121-22, 128 (1926). See also, *Lands of Papago Indians*, 54 I.D. 359, 370 (1934).

[18] Hearings, Subcomm. of the Committee on Indian Affairs, H.R., 69th Cong., 1st Sess. on H.R. 9133, at 97.

Order lands remained in the United States.[19] Assistant Secretary of the Interior Edwards expressed his opinion that the tribes did not have a "vested right" in the oil underlying Executive Order reservations since the fee remained in the United States.[20]

The Jicarilla arguments that the Indians did not oppose the state taxation alternative (Jicarilla Brief, 40) and that "there was never any compromise" between the states and the tribes as to the allocation of royalty interest and taxation rights are contrary to the record.[21]

Significantly the Tribe fails to cite any support for this contention. The very word "compromise" was used frequently in this context by both federal officials and members of the Congress.[22] In the end the states received no royalty but were allowed to tax not only the producers' share, as they were under the Mineral

[19] *Ibid.*, at 98; *cf.*, *Healing* v. *Jones*, 174 F.Supp. 211, 216 (D.Ariz. 1959).

[20] *Id.*, fn. 17, *supra*, at 81. Even John Collier, Executive Secretary for the American Indian Defense Association, and later Commissioner of Indian Affairs, recognized that the Indian tribes had a much stronger legal claim to treaty reservations than Executive Order reservations. *Ibid.*, at 87-89.

[21] Hearings, Subcomm. of the Committee on Indian Affairs, H.R. 69th Cong., 1st Sess. on H.R. 9133 at 11, 22, 25-28, 44-50 (1926); Hearings, Subcomm. of the Committee on Indian Affairs, Sen. 69th Cong. 1st Sess. at 95 (1926); 66 Cong. Rec. 999 (1924); Hearings, Subcomm. on Indian Affairs, Sen., 69th Cong. 1st Sess. on S.1722, S.3154, at 58, 93 (1926); Hearings, Committee on Indian Affairs, H.R. 69th Cong. 2d Sess. on H.R. 15021, at 8, 41 (1927); Hearings, Committee on Indian Affairs, Sen. 69th Cong. 1st Sess. on S.3159, and S.4152, at 9-14, 69 Cong. Rec. 4580 (1927); 66 Cong. Rec. 2234 (1925).

[22] See, *e.g.*, Hearings, Subcomm. of the Committee on Indians Affairs, H.R. 69th Cong. 1st Sess. on H.R. 9133, at 25, 26, 27, 45, 46 (1926); Hearings, Subcomm. of the Committee on Indian Affairs, Sen., 69th Cong., 1st Sess. on S.1722, S.3159, at 53, 61, 83, 84 (1926); Hearings, Committee on Indian Affairs, H.R., 69th Cong. 2d Sess. on H.R. 15021, at 42 (1927); Hearings, Committee on Indian Affairs, 69th Cong. 1st Sess. on S.3159, S.4152, at 12, 14 (1926).

Lands Leasing Act of 1920, 30 USC 181, *et seq.*, but also the Indians' royalty share.

C.

The Provisions of 25 USC 398c Apply.

The acceptance by all parties of state taxation of oil and gas produced on the Jicarilla Reservation for approximately four decades indicates 25 USC 398c controls regardless of whether Petitioners' leases were issued under that Act or the later Act of May 11, 1938, 25 USC 396. The fact that neither the Tribe nor the Secretary has challenged state taxation of these leases for more than thirty years is a factor to weigh heavily as part of the "jurisdictional history" of the Jicarilla reservation. *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 604 (1977). *Blackfeet Tribe* v. *Montana*, No. CV-78-61 GF, at 11 (D. Mont. January 6, 1981).[23] This is especially true since Congress has failed to alter this administrative practice. *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367 (1969).

In support of the contention that 25 USC 396, rather than 25 USC 398c, applies, the Tribe argues that the former Act allows payment of royalties directly to the tribes while the royalties under 25 USC 398c are paid to the United States Treasury for the credit of the tribe. In fact, however, Petitioners make their royalty payments to the United States Geological Survey for the benefit of the Tribe, consistent with the Tribe's own reading of 25 USC 398c. (R 79-80).

CONCLUSION

Petitioners submit there is no legal foundation for the Jicarilla Apache Tribe to impose taxes on oil and gas produced on valid

[23] It is also significant in this regard that the Jicarilla Apache Tribe failed to mention its alleged right to tax this same oil and gas production during this period. Indeed, the Jicarilla Constitutions of 1937 and 1960 did not assert the taxation authority over non-members of the Tribe. (R. 105).

federal leases on the reservation. Neither the tenuous concept of inherent sovereignty, nor the applicable treaties and laws of the United States, particularly the Treaty of Guadalupe Hidalgo or the Indian Reorganization Act, nor the Constitution of the United States itself supports or permits assertion of tribal sovereignty in this case.

Alternatively, the concept of "inherent sovereignty" requires remand to take evidence and make judicial findings and conclusions with respect to any sovereignty the Jicarilla Apache Tribe may have had, prior to subjugation of that tribe and creation of its reservation status. Inherent sovereignty does not permit attribution of the power of taxation to the Jicarilla Apache Tribe.

Assuming *arguendo,* any degree of tribal self-government, any tribal taxation which might be asserted by the Jicarilla Apache Tribe has been preempted.

For these and other reasons set forth above and set forth more fully in their initial Brief, and in their Petition for Writ of Certiorari, Petitioners Merrion and Bayless, *et al.* respectfully submit that the Jicarilla Apache Tribal tax is invalid and that the judgment and opinion of the Court of Appeals below be reversed and vacated.

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Respectfully submitted,

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